(1) Supreme Court, U.S.
FILED

No. 02 1255 JAN 30 2003

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

F/V JEANINE KATHLEEN, Official No. 972086, Her Tackle, Furniture and Apparel, *in rem*; F/V ROSE LEE, Official No. 942678, Her Tackle, Furniture and Apparel, *in rem*; F/V TALIA, Official No. 973296, Her Tackle, Furniture and Apparel, *in rem*, Defendants

and

ROGER L. INGMAN; JODY K. INGMAN; ROSE LEE LLC; DENNIS H. EAMES; ANDREA J. EAMES,

Petitioners

v.

VENTURA PACKERS, INC., a California corporation,

Respondent

PETITION FOR WRIT OF CERTIORARI

CAROLYN J. SHIELDS
Counsel of Record
BAILEY & PARTNERS
2828 DONALD DOUGLAS
LOOP NORTH
SANTA MONICA, CA 90026
(310) 392-5000
Attorney for Petitioners

59pp

QUESTION PRESENTED

Where there is no maritime contract as a basis for the federal courts' *in rem* admiralty jurisdiction under 28 U.S.C. § 1333, does the Commercial Instruments and Maritime Lien Act, 46 U.S.C. § 31342, provide an independent basis of admiralty jurisdiction?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners Roger L. and Jody K. Ingman, Owners of the F/V JEANINE KATHLEEN; Rose Lee LLC, Owner of the F/V ROSE LEE; and Dennis H. Eames and Andrea J. Eames, Owners of the F/V TALIA, filed restricted appearances under Rule E(8) of the Supplemental Admiralty Rules to defend this *in rem* action against their fishing vessels. Rose Lee LLC is not publicly traded.

Respondent

Respondent is Ventura Packers, Inc., a California Corporation. It is not publicly traded. Ventura Packers, Inc., which claimed maritime liens against each of the Petitioners' fishing vessels, was the plaintiff in the District Court and the Appellant in the Ninth Circuit Court of Appeals.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties have no parent companies or non-wholly-owned subsidiaries to list.

TABLE OF CONTENTS

Question Presented.....i
Parties to the Proceeding.....ii
Rule 29.6 Corporate Disclosure Statement.....ii
Table of Contents.....iii
Table of Cited Authorities.....iv
Opinions Below.....1
Statement of Jurisdiction.....1
Constitutional and Statutory Provisions Involved.....3
Statement of the Case.....4
Reasons for Granting the Petition.....6
I. The Ninth Circuit's Decision Conflicts With Decisions of the Supreme Court.....6
II. The Ninth Circuit's Decision Conflicts With the Decisions of the Courts of Appeal of Six Circuits and With a Prior Decision of the Court of Appeals for the Ninth Circuit...7
1. First Circuit.....7
2. Second Circuit.....8
3. Third Circuit.....8
4. Eighth Circuit.....10
5. Tenth Circuit.....10
6. Eleventh Circuit.....11
7. Ninth Circuit.....12
III. The Maritime Lien Acts Effected No Change in the Law Which Came Before Them, Including the Law of Maritime Liens Under the General Maritime Law.....13

IV. The Ninth Circuit's Analogy to the Death on the High Seas Act ("DOHSA") Is Imperfect Because DOHSA, Unlike the Maritime Lien Acts, Created a Cause of Action Where None Existed Before; The Shipowners' Limitation of Liability Act Is a Better Analogy.....15
VI. The Question Presented Is Important.....17
1. The Ninth Circuit Introduced Disuniformities Among Classes of Maritime Liens.....17
2. The Ninth Circuit Introduced Disuniformities Among the Circuits.....17
Conclusion.....18
Appendix A
Opinion of the Ninth Circuit Court of Appeals.....*1*
Appendix B
Order of the Ninth Circuit Court of Appeals Denying Claimants' Petition for Rehearing and Suggestion for Rehearing *En Banc*.....*29*

TABLE OF CITED AUTHORITIES

Cases

Bermuda Exp., N.V. v. M/V LISA (ex Laurie U), 872 F.2d 554 (3d Cir. 1989).....8

BOAT LA SAMBRA v. Lewis, 321 F.2d 29 (9th Cir. 1963).....12

Bonanni Ship Supply, Inc. v. United States, 959 F.2d 1558, 1559 (11th Cir.1992).....13

Chandris, Inc. v. Latsis, 515 U.S. 347 (1995).....2

Chase Manhattan Financial Services, Inc. v. McMillian, 896 F.2d (10th Cir. 1990).....8-10

Complaint of Sisson, 867 F.2d 341, 350 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358 (1990) 15

David Wright Charter Service of North Carolina, Inc. v. Wright, 925 F.2d 783, 785, 1991 A.M.C. 2927 (4th

Cir. 1991) 15

E.S. Binnings, Inc. v. M/V SAUDI RIYADH,
815 F.2d 660 (11th Cir. 1987), *overruled in part on other grounds*, Exxon Corp. v. Central Gulf Lines, Inc.,
500 U.S. 603 (1991).....9-10

Exxon Corp. v. Central Gulf Lines, Inc.,
500 U.S. 603 (1991).....6,10

Exxon Corp. v. Central Gulf Lines, Inc.,
707 F. Supp. 155, 158 (S.D.N.Y. 1989).....6

Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd, 808 F.2d 697, 1987 A.M.C. 913 (9th Cir. 1978).....6

Guillory v. Outboard Marine Corp.,
956 F.2d 114, 115, 1993 A.M.C. 605 (5th Cir. 1992) 15

The HARVEY AND HENRY v. Schoellkopf,
86 F. 656 (2d Cir. 1898).....14

Inbesa America, Inc. v. M/V ANGLIA,
134 F.3d 1035 (11th Cir. 1998).....11

Interpool Ltd v. Char Yigh (Panama) S.A.,
890 F.2d 1453 1456 n.3 (9th Cir. 1989).....13

Grubart, Inc. v. Great Lakes Dredge & Dock Co.,
513 U.S. 527 (1995).....2

Lewis Charters, Inc. v. Huckins Yacht Corp.,
871 F.2d 1046, 1052-54, 1989 A.M.C. 1521
(11th Cir. 1989).....15

Liverpool & London S.S. Protection & Indem. Ass'n,
296 F.3d 350, 353 (5th Cir. (2002).....2,17

The MARY F. CHISHOLM,
129 F. 814 817 (D. Me. 1904).....5

Minturn v. Maynard,
58 U.S. (17 How.) 477,
5 L. Ed. 235 1855).....6

Murray v. Schwartz,
175 F.2d 72 (2d Cir. 1949).....8

Nilo Barge Line, Inc. v. M/V BAYOU DuLarge,
584 F.2d 841 (8th Cir. 1978).....8

The People's Ferry Company of Boston, Claimants of
the Steamboat JEFFERSON v. Beers,
61 U.S. 393, 399-400 (1857).....14

Piedmont & George's Creek Coal Co. v. Seaboard
Fisheries Co., 254 U.S. 1 (1920).....13

Seven Resorts, Inc. v. Cantlen,
57 F.3d 771, 773 (9th Cir. 1995).....15

Three Buoys Houseboat Vacations, U.S.A., Ltd,
921 F.2d 771, 779-80, 1991 A.M.C. 1356
(8th Cir. 1990) 15

The WALTER ADAMS,
253 F. 20, 24 (1st Cir. 1918), *aff'd sub nom.*
Piedmont & Georges Creek Coal Co. v. Seaboard
Fisheries Co., 254 U.S. 1 (1920).....7,10

Wilkins v. Commercial Investment Trust Corp.,
153 F.3d 1273, 1276, 1287 (11th Cir.
1998).....11

The WILLIAM LEISHEAR,
21 F.2d 862 (D. Md. 1927).....16

Constitution and Statutes

U.S. Const. Art. III, § 2, cl. 1.....3
28 U.S.C. § 1333.....1,3
Commercial Instruments and Maritime Lien Act,
46 U.S.C. §§ 31341, 31342 .....*passim*
46 U.S.C. § 761.....15
Death on the High Seas Act, 46 U.S.C. §§ 761-67....15
Shipowners' Limitation of Liability Act,
46 U.S.C. §§ 183 *et seq*.....15-16

Petitioners pray that a Writ of Certiorari issue to the Ninth Circuit Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals (App., at 1a) is reported at 305 F.3d 913 (9th Cir. 2002). The opinion of the United States District Court for the Central District of California is unreported.

STATEMENT OF JURISDICTION

The Opinion of the Ninth Circuit Court of Appeals was entered on September 11, 2002. (Appendix A.) It reversed and remanded the final judgment of the District Court, which had dismissed this action without prejudice for lack of subject matter jurisdiction under 28 U.S.C. § 1333, after having granted Claimants' motion for summary judgment on the ground that there was no maritime contract and therefore no jurisdiction. The Ninth Circuit agreed with the District Court that there was no maritime contract but found an independent basis of jurisdiction over this *in rem* action in the Commercial Instruments and Maritime Lien Act ("Maritime Lien Act"), 46 U.S.C. § 31342. The Ninth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing *En Banc*

on November 1, 2002. (Appendix B.)

The Opinion of the Ninth Circuit is not a final judgment, but it found subject matter jurisdiction where no court had found it before and in the absence of a maritime contract, in conflict with the decisions of this Court and of every circuit that has addressed this issue, including the First, Second, Third, Eighth, Tenth, and Eleventh Circuits (and the Ninth Circuit, before the Court of Appeals' Opinion in this case)..

This Court has jurisdiction over such an interlocutory decision under 28 U.S.C. § 1254(1), which permits this Court to review a case in the courts of appeals "before or after rendition of judgment or decree." Because the issue over which review is sought is the power of the District Court to act at all in an *in rem* admiralty case where there is no maritime contract, review by this Court before final judgment would be beneficial. Subject matter jurisdiction, though important in all cases, is particularly important in an *in rem* admiralty case: (1) The sale of the *res*, the vessels, by a District Court without admiralty jurisdiction would not extinguish all maritime liens or confer good title on the purchaser. (2) Creating jurisdiction and the possibility of a maritime lien where none has come before prejudices creditors whose liens arose earlier in the vessel's voyage. (3) The Court of Appeals' decision interferes with the uniformity of the general maritime law in that "a

maritime lien would appear and disappear as the ship sailed to different jurisdictions that might or might not recognize such a lien." *Liverpool & London S.S. Protection & Indem. Ass'n*, 296 F.3d 350, 353 (5th Cir. 2002). This Court has reviewed interlocutory orders involving admiralty jurisdiction in such cases as *Jerome Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995); *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article II, § 2, cl. 1 of the Constitution of the United States provides: "The judicial Power shall extend . . . . to all Cases of admiralty and maritime Jurisdiction . . . ."

The Maritime Lien Act provides:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner—
>
> (1) has a maritime lien on the vessel;
>
> (2) may bring a civil action in rem to enforce the lien; and
>
> (3) is not required to allege or prove in the action that credit was given to

the vessel.

(b) This section does not apply to a public vessel.

46 U.S.C. § 31342.

The District Court's admiralty jurisdictionderives found in 28 U.S.C. § 1333:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of:
>
> (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.
>
> (2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.

STATEMENT OF THE CASE

Respondent claimed it was owed money by Independent Fishermen's Cooperative ("Co-op"), a cooperative corporation whose members (shareholders) are fishermen, including Petitioners. The Co-op is not a party. to this litigation. Respondent based its claim on a letter memorializing an alleged agreement pursuant to which Respondent would provide certain services to the Co-op for a certain price. The price was

for a wide range of services, from unloading fish to providing land-based services like packing, transportation by truck to a storage facility, and handling certain record-keeping matters. Petitioners were not parties to the letter or to any agreement it might have memorialized.

The Co-op did not pay as much as Respondent believed it was owed; and Respondent sued the Co-op in the Superior Court of the State of California for the County of Ventura. While that action was pending, Respondent commenced this *in rem* action in federal court against the vessels owned by the three Petitioners. In the *in rem* action, Respondent sought to recover on an alleged maritime lien theory against Petitioners' boats what it had not recovered from the Co-op. During the pendency of both actions, the Co-op filed a petition in bankruptcy.

Petitioners variously posted a bond and security to obtain the release of the vessels, filed a Claim in the District Court, and filed a motion to dismiss the action on the ground that the federal court lacked subject matter jurisdiction because there was no maritime contract, and on the ground that the requirements of a maritime lien were not satisfied. The District Court, Collins, J., denied Petitioners' motion without prejudice, stating that the jurisdictional issue was intertwined with the merits, and that the court would entertain a motion for summary judgment on the same

grounds after facts had been developed during discovery.

After a series of depositions, the parties filed cross-motions for summary judgment. Petitioners' motion sought dismissal of the action on the ground that, in the absence of a maritime contract, the court lacked subject matter jurisdiction over this action. Respondent's motion sought enforcement of its alleged maritime liens. The District Court granted Petitioners' motion and denied Respondent's motion, holding that, though there were maritime and nonmaritime aspects of the letter, the maritime and nonmaritime aspects were inseparable without prejudicing the rights of Petitioners and therefore there was no maritime contract. Without a maritime contract, the District Court held it had no subject matter jurisdiction to adjudicate the claimed maritime liens, and it entered judgment in favor of Petitioners and ordered the release of the security.

Respondent appealed, and the Court of Appeals for the Ninth Circuit reversed, agreeing with the District Court that there was no maritime contract but finding jurisdiction in the Maritime Lien Act even where there is no maritime contract. Thus, the pure question presented is whether the Maritime Lien Act can be an independent basis of federal admiralty jurisdiction in the absence of a maritime contract (or maritime tort), or whether maritime contract (or maritime tort)

jurisdiction is necessary before a District Court can adjudicate a maritime lien.

REASONS FOR GRANTING THE PETITION

There can be a maritime contract without a maritime lien, *see, e.g., Foss Launch & Tug Co. v. Char Ching Shipping U.S.A., Ltd*, 808 F.2d 697, 1987 A.M.C. 913 (9th Cir. 1978), but there cannot be a maritime lien for necessaries without a maritime contract. See the cases cited *infra*.

I. The Ninth Circuit's Decision Conflicts with Decisions of the Supreme Court

Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 111 S. Ct. 2071, 114 L. Ed. 2d 649 (1991), involved the supply of fuel to a vessel by an agent of the bunker supplier. The Supreme Court overruled the rule of *Minturn v. Maynard*, 58 U.S. (17 How.) 477, 15 L. Ed. 235 (1855), that agency contracts cannot be maritime contracts, instead holding that agency contracts may be maritime contracts if "the services performed under the contract are maritime in nature," and that the agency contract before it was a maritime contract. The Supreme Court left intact the other part of the lower court's holding, that "[a] prerequisite to the existence of a maritime lien based on a breach of contract is that

the subject matter of the contract must fall within the admiralty jurisdiction." *Exxon Corp. v. Central Gulf Lines, Inc.*, 707 F. Supp. 155, 158 (S.D.N.Y. 1989).

The Supreme Court presumed the different treatment of maritime contracts and nonmaritime contracts: maritime contracts could give rise to maritime liens for necessaries; nonmaritime contracts could not. If the Ninth Circuit's rule were the law, the district court could have gone directly to the elements of a maritime lien without first determining whether a contract is maritime or nonmaritime, a distinction that would become meaningless under the Ninth Circuit's rule.

II. The Ninth Circuit's Decision Conflicts With the Decisions of the Courts of Appeals of Six Circuits and With a Prior Decision of the Court of Appeals for the Ninth Circuit

1. First Circuit

The First Circuit Court of Appeals has held: "A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty. " *The WALTER ADAMS*, 253 F. 20, 24 (1st Cir. 1918), *aff'd on an alternative ground sub nom. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1 (1920).

2. Second Circuit

If the claimed maritime lien for alleged necessaries arises out of a contract that is not maritime, there is no jurisdiction to inquire further. One reason why a contract involving the provision of supplies is not a maritime contract is that it relates to a "dead" vessel, that is, one that has been withdrawn from navigation. Such a contract was involved in *Murray v. Schwartz*, 175 F.2d 72 (2d Cir. 1949), where wharfage was provided to the S.S. METEOR, a dead ship: "A wharfage contract touching a dead ship is not maritime, and a contract which is not maritime cannot create a lien subject to the jurisdiction of admiralty. 175 F.2d at 72-73.

3. Third Circuit

In *Bermuda Exp., N.V. v. M/V LISA (ex Laurie U)*, 872 F.2d 554, 563 (3d Cir. 1989), though the district court concluded there was a maritime lien for unpaid services claimed as necessaries, the Third Circuit Court of Appeals expressly refused to reach that issue, holding there was no maritime contract.

4. Eighth Circuit

The determination that a contract for the supply of materials and equipment for the new construction of a vessel was not a maritime contract was the end of inquiry in *Nilo Barge Line, Inc. v. M/V BAYOU DuLarge*, 584 F.2d 841, 842, 1980 A.M.C. 750 (8th Cir. 1978).

5. Tenth Circuit

Chase Manhattan Financial Services, Inc. v. McMillian, 896 F.2d 452 (10th Cir. 1990), involved competing claimants to the houseboat PATRIOT, including suppliers of necessaries, raw materials and labor to construct the houseboat. The court asked whether there was a maritime contract, and answered, No:

> Contracts for building a ship, or supplying materials for the original construction of a ship, are not "maritime" contracts within the province of admiralty jurisdiction. . . .
>
> The necessary corollary to this principle is that contracts for building or supplying materials for the original construction of ships do not create "maritime" liens because such contracts are not "maritime" contracts.

896 F.2d at 457.

6. Eleventh Circuit

E.S. Binnings, Inc. v. M/V SAUDI RIYADH, 815 F.2d 660 (11th Cir. 1987):

> Binnings argues that the district court had admiralty jurisdiction over this action even if the contract out of which Binnings' services arose is not a maritime contract because the FMLA provides a separate basis for jurisdiction. Binnings asserts that the maritime nature of the contract is relevant only to liens arising under the general maritime law and that a maritime lien can arise and be enforced under the FMLA although the underlying contract would not be considered maritime. The district court agreed . . . .
>
> This argument misconstrues the nature of maritime liens. Maritime liens arise out of the breach of contracts that are maritime in nature. 7A J. Moore, *supra*, para. C.05, at 623. Therefore, "to give rise to a maritime lien, the occurrence out of which the . . . dispute arose must itself be maritime" and "[t]hat means that the occurrence must be within the admiralty jurisdiction of the United States as established by the Constitution

and adopted by the Congress." *Id.* para C.03, at 611; *accord, The Walter Adams,* 253 F. 20, 24 (1st Cir.1918), *aff'd sub nom. Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co.,* 254 U.S. 1, 41 S. Ct. 1, 65 L. Ed. 97 (1920) ("A contract cannot afford the necessary basis for a maritime lien, unless it is maritime in its nature, so as to be cognizable in admiralty"); G. Gilmore & C. Black, *supra,* § 9-20, at 624 ("To give rise to a lien a claim must be in the first instance maritime" and "[t]hus we recur to the question of what is within the jurisdiction of the admiralty: . . . which contracts are maritime contracts," for "[t]here can be no maritime lien which does not involve a vessel, its cargo or freight and arise out of a maritime contract or a maritime tort or some peculiarly maritime operation such as salvage."). Therefore, a prerequisite to the existence of a maritime lien based on breach of a contract for services is that the subject matter of the contract must fall within the admiralty jurisdiction.

815 F.2d at 665-66, *overruled in part on other grounds, Exxon Corp. v. Central Bulk Lines, Inc.,* 500 U.S. 603, 111 S. Ct. 2071, 114 L. Ed. 2d 649 (1991) (footnote omitted).

The party seeking a maritime lien in the *Binnings* case, as subagent of the vessel's agent, provided certain

port services to the vessel, including husbanding services, cargo solicitations, documentation services, and financial services. Based on then-existing precedent, the Eleventh Circuit held the contract was not maritime and therefore "[t]he district court was without subject matter jurisdiction over this *in rem* proceeding." 815 F.2d at 667. Although the Supreme Court later held that an agency contract could be a maritime contract, it did not disturb the rule that the court is without jurisdiction to adjudicate a maritime lien where there is no maritime contract, and that portion of the Eleventh Circuit's holding in *Binnings* continues to be relied on. *See, e.g., Wilkins v. Commercial Investment Trust Corp.*, 153 F.3d 1273, 1276, 1287 (11th Cir. 1998), an action by parties claiming a maritime lien as alleged subrogees of a person who provided necessaries to refurbish a vessel. In *Wilkins*, the Court of Appeals affirmed the dismissal of the maritime lien claims for lack of subject matter jurisdiction.

Inbesa America, Inc. v. M/V ANGLIA, 134 F.3d 1035, 1036, 1038 (11th Cir. 1998), involved a claimed maritime lien for necessaries, certain docking and cargo-handling services. The Eleventh Circuit Court of Appeals held the contract was a mixed maritime and nonmaritime contract, and remanded for a determination on the separability issue.

7. Ninth Circuit

Before the Ninth Circuit's decision, there were seven circuits—including the Ninth Circuit—that required a maritime contract in order to adjudicate a maritime lien. The Ninth Circuit's decision in this case creates disharmony within the Ninth Circuit.

The Ninth Circuit required dismissal of *BOAT LA SAMBRA v. Lewis*, 321 F.2d 29 (9th Cir. 1963) for lack of jurisdiction. The Court held that the supply of equipment (radio and autopilot) to the boats BEANY and LA SAMBRA before they were launched were not maritime contracts: without maritime contracts the Court lacked jurisdiction over the claimed maritime lien for necessaries:

> [W]hether the cases came within the admiralty jurisdiction of the court . . . depends upon whether the contracts for this equipment and its installation related to the repair of completed boats or to their original construction, the settled law, applicable here, is that 'a contract for the former is maritime; if for the latter, it is not.' . . . The judgments are reversed and the cases are remanded to the district court with directions to dismiss.

321 F.2d at 29-30.

III. The Maritime Lien Acts Effected No Change in the Law Which Came Before Them, Including the Law of Maritime Liens Under the General Maritime Law

The 1989 amendments to the Maritime Lien Act effected no substantive change in the prior act: "Although the wording of the maritime lien provision has been changed, its substance remains the same." *Interpool Ltd v. Char Yigh (Panama) S.A.*, 890 F.2d 1453 1456 n.3, 1990 A.M.C. 1 (9th Cir. 1989). Similarly, the Eleventh Circuit Court of Appeals in *Bonanni Ship Supply, Inc. v. United States*, 959 F.2d 1558, 1559 (11th Cir. 1992), quoted the legislative history of new Maritime Lien Act as stating: "'This section makes no substantive change to law.' U.S. Code Cong. & Admin. News, 100th Cong., 2d Sess. 6104, 6141 (1988). [T]his court's interpretation of that law prior to the enactment of the MCILA . . . binds courts of this circuit interpreting the MCILA." *Id.* "Congress did not purport to alter the rights and obligations of parties under preexisting admiralty law when it enacted the MCILA . . . ." 959 F.2d at 1563-64.

The predecessor Act, the 1910 Maritime Lien Act, with three exceptions not here relevant, did not intend to effect any change in the rules under the pre-statutory general maritime law. *Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1,

11-12 (1920).

IV. Pre-Statutory Maritime Lien Cases Required a Maritime Contract and Remain Authoritative After Enactment of the Maritime Lien Act

Pre-Maritime Lien Act cases are instructive because the statutes effected no change in the law governing maritime liens. The courts in these cases dismissed *in rem* actions for enforcement of maritime liens for necessaries where there was no maritime contract, without reaching the elements of a maritime lien. The methodology was:

(1) Is there a maritime contract?

(2) If not, dismiss for lack of jurisdiction.

(3) If there is, only then analyze whether the (other) requirements of a maritime lien are satisfied.

In *The People's Ferry Company of Boston, Claimants of the Steamboat JEFFERSON v. Beers, 61* U.S. 393, 399-400 (1857), this Court dismissed for lack of jurisdiction an action to enforce a maritime lien based on a nonmaritime contract, nonmaritime because it involved the provision of labor and materials for the construction of new ferry boats.

In *The HARVEY AND HENRY v. Schoellkopf*, 86 F. 656 (2d Cir. 1898), the Court of Appeals held the action should be dismissed, holding that "[t]he maintaining of

an office, the keeping of a book, the solicitation of freights [for canal boats on the Erie Canal] and the tendering of such as they may obtain to the listed boats in regular order are none of them maritime transactions . . . . [I]t would seem that a controversy arising upon such a contract is not cognizable in the admiralty courts." *Id.* at 658.

V. The Ninth Circuit's Analogy to The Death on the High Seas Act ("DOHSA"), Is Imperfect Because DOHSA, Unlike the Maritime Lien Acts, Created a Cause of Action Where None Existed Before; The Shipowners' Limitation of Liability Act Is a Better Analogy

The Ninth Circuit analogized its rule to the Death on the High Seas Act (DOHSA), 46 U.S.C. §§ 761-67. The analogy is imperfect, because DOHSA created a cause of action where none existed before, and expressly provided the basis of jurisdiction for it: "in admiralty." 46 U.S.C. § 761. In contrast, as discussed above, the Maritime Lien Act codified pre-existing law and effected no substantive change in pre-statutory law. The Supreme Court and the Courts of Appeal in other circuits are in agreement that it does not provide an independent basis of jurisdiction.

A better analogy is to the Shipowners' Limitation of Liability Act ("Limitation Act"), 46 U.S.C. §§ 183 *et seq.*

Like the Maritime Lien Act, it has been held not to have created any cause of action. *Three Buoys Houseboat Vacations, U.S.A., Ltd*, 921 F.2d 771, 779-80, 1991 A.M.C. 1356 (8th Cir. 1990). The Limitation Act has been held not to provide an independent basis of federal jurisdiction, but to require, as a precondition to invoking it, that a case be within the court's admiralty jurisdiction. *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 773, 1995 A.M.C. 2087 (9th Cir. 1995); *David Wright Charter Service of North Carolina, Inc. v. Wright*, 925 F.2d 783, 785, 1991 A.M.C. 2927 (4th Cir. 1991); *Complaint of Sisson*, 867 F.2d 341, 350 (7th Cir. 1989), *rev'd on other grounds*, 497 U.S. 358, 110 S. Ct. 2892, 111 L. Ed. 2d 292 (1990); *Guillory v. Outboard Marine Corp.*, 956 F.2d 114, 115, 1993 A.M.C. 605 (5th Cir. 1992); *Three Buoys Houseboat Vacations, U.S.A., Ltd*, 921 F.2d 771, 779-80, 1991 A.M.C. 1356 (8th Cir. 1990); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1052-54, 1989 A.M.C. 1521 (11th Cir. 1989).

This Court has not decided the related issue whether a DOHSA action requires the twin jurisdictional requirements of maritime locality and nexus with traditional maritime activity.

VI. The Question Presented Is Important

1. The Ninth Circuit Introduces Disuniformities Among Classes of Maritime Liens

Maritime liens for necessaries covered by the Maritime Lien Act are not the only maritime liens. Other maritime liens, including maritime contract liens other than maritime liens for necessaries, were created by and are governed by the general maritime law with no statute applicable to them. These other maritime liens include liens for: expenses of a vessel while *in custodia legis*; seamen's wages; salvage and general average; maritime tort claims; and maritime contract claims (which include contract claims other than claims for necessaries). *See, e.g., The WILLIAM LEISHEAR*, 21 F.2d 862 (D. Md. 1927) (types of maritime liens and their priorities). After the Ninth Circuit's decision, a maritime contract (or a maritime tort) would be required of all maritime liens except maritime liens for necessaries.

2. The Ninth Circuit Introduces Disuniformities Among the Circuits

In *Liverpool & London S.S. Protection & Indemn. Ass'n*, 296 F.3d 350 (5th Cir. 2002), the court decided

a choice of law issue: whether the existence of a maritime lien would be governed by the law applicable to the contract or the law of the place of arrest. The court was concerned about uniformity, concerned that "a maritime lien would appear and disappear as the ship sailed to different jurisdictions that might or might not recognize such a lien." 296 F.3d at 353. The court considered the choice to be between English law and United States law, considering the latter to be one, uniform law ("United States substantive law"), not a system of different rules in different circuits.

CONCLUSION

For the reasons set forth herein, Petitioners respectfully submit that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted

Carolyn J. Shields
Counsel of Record for
Petitioners
Bailey & Partners
2828 Donald Douglas Loop North
Santa Monica, CA 90405
Telephone: 310-392-5000
Facsimile: 310-392-8091

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

VENTURA PACKERS, INC., a California corporation,
Plaintiff-Appellant,
v.
F/V JEANINE KATHLEEN, Official No. 972086, her tackle, furniture & apparel in rem; F/V ROSE LEE, Official No. 942678, her tackle, furniture & apparel in rem; F/V TALIA, Official No. 973296, her tackle, furniture & apparel in rem,
Defendants,
and
ROGER L. INGMAN; JODY K. INGMAN; ROSE LEE LLC; H. EAMES; ANDREA J. EAMES,
Claimants-Appellees.

No. 00-56448
D.C. No.
CV-98-09916-ABC
OPINION

Appeal from the United States District Court
for the Central District of California
Audrey B. Collins, District Judge, Presiding

Argued and Submitted
February 6, 2002—Pasadena, California

Filed September 11, 2002

Before: Stephen S. Trott, Sidney R. Thomas, and
Kim McLane Wardlaw, Circuit Judges

Opinion by Judge Trott

COUNSEL

Denise A. Brogna, Lascher & Lascher, Ventura, California, for the plaintiff-appellant.

Carolyn J. Shields, Bailey & Partners, Santa Monica, California,for the claimants-appellees.

OPINION

TROTT, Circuit Judge:

Ventura Packers, Inc. ("Ventura Packers") sued in rem three fishing vessels, the F/V Jeanine Kathleen,

the F/V Rose Lee, and the F/V Talia ("the Ships"), to enforce a necessaries lien. On the Ships' motion for summary judgment, the district court dismissed the case for lack of subject matter jurisdiction.

Ventura Packers appealed. We have jurisdiction over its timely appeal pursuant to 28 U.S.C. § 1291. We hold that the Federal Maritime Lien Act, 46 U.S.C. § 31342, establishes statutory elements, which if met, invoke the admiralty jurisdiction of the federal courts. As Ventura Packers established a triable issueof fact regarding whether it met these jurisdictional elements, we reverse the district court's dismissal of its complaint and remand the case for additional proceedings.

BACKGROUND

In an effort to create economies of scale unavailable to individual anglers, several commercial fishermen banded together to form the Independent Fishermen's Cooperative("IFC"), incorporated in Alaska by Gregory Kirsch ("Kirsch"). IFC's founding members included Dennis Eames, owner of the F/V Talia, Roger Ingman, co-owner with his wife Jody Ingman of the F/V Jeanine Kathleen, and Richard and Mitchell Eide, owners and masters, at that time, of the F/V Rose Lee, which is now owned by Rose Lee LLC (collectively "the

Owners"). IFC's members envisioned making boatloads of money by assuming the risks traditionally borne by the fishing industry's middlemen. Instead of immediately selling the catch at the dock to local fish buyers, IFC decided it would ice, process, package, and transport the fish itself and then sell it for a higher price further down the stream of commerce.

IFC's members opted to participatein the 1996-97 Ventura/ Santa Barbara squid fishing season. As relatively new fishermen to these seas, IFC's members lacked long-term relationships with and, consequently, priority access to local fish unloading facilities. Speed in unloading the catch and priority dock access are essential because if squid is not brought to port, processed, and frozen within twenty-four hours, the squid flesh begins to spoil. Priority docking and unloading services also return a boat to the sea quickly, thereby maximizing its time devoted to harvesting squid and minimizing its time laid up in port. To obtain priority service, IFC, through Kirsch, negotiated with Ventura Packers to unload and document its members' catch. For the 1996-97 season, IFC agreed to pay Ventura Packers $50/ton tounload and pack the squid; $20/ton "to administer [IFC's] business in Ventura with government entities, transportation companies, processors, and cold storages"; and $10/ton for priority access to Ventura

Packers' unloading facilities.

Ventura Packers provided the Ships with priority service on 188 different occasions during the 1996-97 season. Each time a Ship was unloaded, Ventura Packers documented the catch using a California Department of Fish and Game landing receipt ("California fish ticket"), many of which bear the signature of the Ship's owner or master. The sea yielded a bountiful 1996-97 squid season. Ventura Packers unloaded a total of 5,892 tons of squid from the Ships: 2,437 tons from the Rose Lee; 1,554 tons from the Talia; and 1,901 tons from the Jeanine Kathleen. At a sales price of $250/ton, this squid tonnage amounted to nearly $1,473,000 for the Ships. Despite the profitable fishing season, however, the Ships allegedly failed to settle their respective accounts with Ventura Packers. Ventura Packers claims that at season's end, the Jeanine Kathleen owed $22,000; the Talia owed $43,000; and the Rose Lee was in the red a whopping $105,000. The Ships, of course, dispute their liability as well as the accuracy of these amounts.

To recover these allegedly unpaid amounts, Ventura Packers filed suit in state court against IFC. While the state suit was pending, Ventura Packers filed this in rem admiralty action against the Ships pursuant to Federal Rule of Civil Procedure 9(h) and Rule C of the

Supplemental Rules for Certain Admiralty and Maritime Claims. Ventura Packers alleged a necessaries lien under § 31342 and requested arrest of the Ships. The Owners intervened and submitted undertakings, a type of maritime bond, in lieu of having the Ships arrested. The Owners then moved to dismiss the complaint for lack of subject matter jurisdiction. The district court initially denied the Owners' motion to dismiss.

The Owners answered, and discovery proceeded. The parties cross-moved for summary judgment. The Owners again argued that the district court lacked subject matter jurisdiction to adjudicate the action. Ventura Packers responded that admiralty jurisdiction was proper under 46 U.S.C. § 31342 and the common law. The district court granted the Owners' motion and dismissed the case.

Ventura Packers appeals.

STANDARD OF REVIEW

We review the grant of summary judgment de novo. *Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910(9th Cir.1997). We must determine, viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of

material fact and whether the district court correctly applied the relevant law. *Robi v. Reed,* 173 F.3d 736, 739 (9th Cir.1999). We review de novo the district court's determination that it lacked subject matter jurisdiction, *H2O Houseboat Vacations Inc. v. Hernandez,* 103 F.3d 914, 916 (9th Cir.1996), and the district court's interpretation of 6 U.S.C. § 31342, *Port of Portland v. The M/V Paralla,* 892 F.2d 825, 827 (9th Cir.1989).

DISCUSSION

I. Existence of Admiralty Jurisdiction[1]

[1] "The precise scope of admiralty jurisdiction is not a matter of obvious principle or of very accurate history." *The Blackheath,* 195 U.S. 361, 365 (1904). Though not confined to vessels, admiralty naturally centers around them, as the great agents of maritime affairs. Here, the district court held it lacked

---

[1] Packers argues that the district court had subject matter jurisdiction over its suit in rem based on federal question jurisdiction, 28 U.S.C. § 1331, and diversity jurisdiction, 28 U.S.C. § 1332. These arguments are meritless. If the district court had jurisdiction over this in rem action, it was in admiralty or not at all. *Madruga v. Superior Court,* 346 U.S. 556, 560, 74 S.Ct. 298, 98 L.Ed. 290 (1954); *Wingerter v. Chester Quarry Co.,* 185 F.3d 657, 665 (7th Cir.1998) (per curiam) ("[A]n in rem claim ... is within the exclusive admiralty jurisdiction of the federal courts."); *Guidry v. Durkin,* 834 F.2d 1465, 1469 (9th Cir.1987) ("*[I]n rem* actions involving maritime liens fall within the exclusive admiralty jurisdiction of the federal district courts.").

Ventura Packers additionally requests leave to amend to invoke properly diversity jurisdiction. To do so, Ventura Packers would need to name new defendants because a vessel is not a citizen of any state and cannot be sued in diversity. *See Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1065 n. 3 (5th Cir.1981). Ventura Packers did not make this request before the district court, and we decline to address it for the first time on appeal. *See Int'l Union of Bricklayers & Allied Craftsman Local Union No. 20 v. Martin Jaska, Inc.,* 752 F.2d 1401, 1404 (9th Cir.1985) (noting that ordinarily we do not consider issues not raised below).

admiralty jurisdiction because the contract between Ventura Packers and IFC was not a wholly maritime contract and its maritime portion could not be severed from its non-maritime portion without prejudice to the Ships. We agree with the district court that the contract is not wholly maritime and is not severable. The district court, however, did not consider whether Congress provided an independent statutory basis for admiralty jurisdiction by enacting 46 U.S.C. § 31342.

[2] The relevant section of the Maritime Lien Act, 46 U.S.C. § 31342,[2] provides:

> (a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the

---

[2] First codified in 1910, the Maritime Lien Act sought to clarify under what circumstances a valid necessaries lien arises. It did away with the artificial distinction, expressed in *The General Smith*, 4 Wheat. 438, 17 U.S. 438, 443, 4 L.Ed. 609 (1819), that a maritime lien was given for supplies provided in a foreign port but not for those furnished in the vessel's home port. It also rejected the presumption that, when the owner contracts in person for necessaries or is in port when they are ordered, the supplier did not rely on the credit of the vessel. *See generally Piedmont & George's Creek Coal Co. v. Seaboard Fisheries Co.*, 254 U.S. 1, 11, 41 S.Ct. 1, 65 L.Ed. 97 (1920). The current version of the Maritime Lien Act, 46 U.S.C. §§ 31341-31342, succeeds its predecessor, 46 U.S.C. §§ 971-973. Although Congress altered the text of the statute, it intended no substantive change.

owner—

(1) has a maritime lien on the vessel;

(2) may bring a civil action in rem to enforce the lien; and

(3) is not required to allege or prove in the action that credit was given to the vessel.

(b) This section does not apply to a public vessel.

Ventura Packers argues that § 31342 provides particular elements, which if met, allow the federal district court to exercise its admiralty jurisdiction. The Ships respond that admiralty jurisdiction is proper only upon meeting the common law requirement that a maritime contract underlie the necessaries lien. We agree with Ventura Packers. If a plaintiff demonstrates that he (1) provided necessaries (2) toa vessel (3) on the order of the owner or a person authorized by the owner, then he may bring a civil action in rem to a federal district court sitting in admiralty.

A. The Maritime Lien Act Expresses the

Elements Necessary To Invoke the District Court's Admiralty Jurisdiction

[3] A federal court's authority to hear cases in admiralty flows initially from the Constitution, which extends federal judicial power "to all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. Congress, in turn, embodied that power in a statute giving federal district courts "original jurisdiction ... of ... [a]ny civil case of admiralty or maritime jurisdiction." 28 U.S.C. § 1333(1).

[4] As the Constitution fixed only the original jurisdiction of the Supreme Court, however, Congress remains free to mold the scope of the federal courts' admiralty jurisdiction as it pleases, and it does so from time to time. *Detroit Trust Co. v. The Thomas Barlum,* 293 U.S. 21, 48, 55 S.Ct. 31, 79 L.Ed. 176 (1934) (noting that Congress may extend admiralty jurisdiction so long as it keeps within "a proper conception of maritime concerns"). The Judiciary Act of 1789, for example, conferred upon the federal district courts exclusive jurisdiction over all cases arising from seizures made on navigable waters under the laws of impost, navigation, or trade of the United States. *See* 1 Erastus C. Benedict, *Benedict on Admiralty* § 109, at 7-21 (2002). Since then, Congress has periodically

enacted specific legislation extending the conditions under which the federal courts may exercise their admiralty jurisdiction. For example, in 1948, Congress extended admiralty jurisdiction "to [ ] include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land." 46 U.S.C. § 740. Prior to the enactment of § 740, an action in admiralty could not have been maintained against a vessel for damages resulting from its collision with a shore structure. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 532-33 (1995).

[5] Most analogous to this case, in 1920, Congress enacted the Death on the High Seas Act ("DOHSA"), which defined a cause of action in admiralty "[w]henever the death of a person shall be caused by wrongful act ... on the high seas beyond a marine league from the shore." 46 U.S.C. § 761. On its face, DOHSA requires only that: (1) a wrongful death occur (2) on the high seas (3) beyond one marine league from shore. If a plaintiff meets those requirements, DOHSA seemingly authorizes that she may bring a wrongful death action in admiralty. By contrast, a common law wrongful death action must include the jurisdictional element that the action bear "a significant relationship to traditional maritime activity." *Executive Jet*

Aviation, Inc. v. City of Cleveland, 409 U.S. 249, 271 (1972). Congress, however, omitted any mention of this common law jurisdictional element from DOHSA.

[6] Although several courts initially presumed that DOHSA implicitly contained the common law's jurisdictional requirement, *see, e.g., Miller v. United States,* 725 F.2d 1311, 1313-15 (11th Cir.1984), the prevailing view holds that DOHSA established independent requirements for the exercise of admiralty jurisdiction. In *Offshore Logistics, Inc. v. Tallentire,* the Supreme Court held that "admiralty jurisdiction is *expressly provided* under DOHSA because the accidental deaths occurred beyond a marine league from shore." 477 U.S. 207, 218 (1986) (emphasis added); *see also Executive Jet,* 409 U.S. at 271 n. 20, 93 S.Ct. 493 ("[U]nder the Death on the High Seas Act, a wrongful-death action arising out of an airplane crash on the high seas beyond a marine league from the shore of a State may clearly be brought in a federal admiralty court."). In *Tallentire,* the Court alternatively held: "Even without this statutory provision [DOHSA], admiralty jurisdiction is appropriately invoked here under traditional principles because the accident occurred on the high seas and in furtherance of an activity bearing a significant relationship to a traditional maritime activity." *Tallentire,* 477 U.S. at 218-19. By explicating

admiralty jurisdiction under DOHSA distinctly from admiralty jurisdiction at common law, the Supreme Court demonstrated that DOHSA provides independent elements, which if met, trigger the admiralty jurisdiction of the federal courts. *Id.*

[7] We discern no meaningful distinction between the Maritime Lien Act's and DOHSA's treatment of admiralty jurisdiction. Although both statutes have analogs at common law, each statute expressly and independently provides for a cause of action in admiralty, upon the fulfillment of certain elements. We, therefore, follow the Supreme Court's lead in *Tallentire* and conclude that the Maritime Lien Act supplies a basis for admiralty jurisdiction independent from those bases available at common law. In so interpreting the Maritime Lien Act, we neither add nor subtract from what Congress passed into law. Specifically, we hold Ventura Packers must demonstrate that: (1) it provided necessaries; (2) to a vessel; (3) by order of the owner or a person authorized by the owner. *See Robert E. Derecktor, Inc. v. Norkin,* 820 F. Supp. 791, 792 (S.D.N.Y.1993) ("The district courts have subject matter jurisdiction ... by ... 46 U.S.C. § 31342, which provides for maritime suits for failure to pay for necessaries to be provided to a vessel."). If Ventura Packers demonstrates these elements, it may invoke the admiralty jurisdiction of

the federal courts to enforce a necessaries lien in rem.

B. A Maritime Contract Is Not Needed To Invoke Admiralty Jurisdiction Pursuant to the Maritime Lien Act.

The Owners argue that Ventura Packers must establish the common law requirement of a maritime contract before it can invoke the admiralty jurisdiction of the district court to enforce a necessaries lien. We disagree. Although a maritime contract may support admiralty jurisdiction, it is not an essential prerequisite to a civil action in admiralty to enforce a statutory necessaries lien.

In general, maritime liens, including necessaries liens, exist to keep ships moving in commerce, while preventing them from sailing away from the debts they incur. The theoretical basis for the maritime lien rests on the legal fiction that the ship itself caused the loss and may be called into court to make good. Maritime liens arise for the unpaid provision of necessaries, breaches of maritime contracts, unpaid seaman's wages, unpaid cargo freight, preferred ship mortgages, as well as in other circumstances. *See* 1 Thomas J. Schoenbaum, *Admiralty & Maritime Law* 496-98 (3d ed.2001) (listing cognizable maritime liens). Although most maritime liens arise by operation of general

maritime law, several are created by statutes, such as the Maritime Lien Act or the Ship Mortgage Act, 46 U.S.C. §§ 31301-31343.

[8] Some maritime liens are based on breaches of an underlying contract, but such a contract is not a prerequisite to assert a valid maritime lien. *See Farwest Steel Corp. v. Barge Sea Span 241,* 769 F.2d 620, 621 (9th Cir.1985) ("The district court had admiralty jurisdiction if it was adjudicating either a maritime lien or a contract relating to the repair of an already constructed vessel.") (citations omitted). For example, a maritime lien for collision is not based upon contract nor is a maritime lien arising from a maritime tort. Therefore, the existence of a maritime contract is not an essential precondition of admiralty jurisdiction to enforce a maritime lien; it is simply one method by which a maritime lien may arise under general maritime law. *See Albany Ins. Co. v. M/V Istrian Express,* 61 F.3d 709, 710 (9th Cir.1995) ("This Circuit recognizes a maritime tort lien irrespective of contractual obligations.").

[9] Like the maritime lien for collision or tort, the maritime lien for necessaries created by § 31342 is not predicated on the existence of a maritime contract. Section 31342 does not mention a maritime contract requirement, and we have unearthed no reason to

impute one. Instead the statute provides for an action in admiralty if necessaries were provided to a vessel "on the *order* of the owner or a person authorized by the owner." Necessaries provided on the order of the owner do not inherently require a maritime contract, and nothing hints that Congress intended the "order" of necessaries to be synonymous with "maritime contract" for necessaries. If Congress had intended a maritime contract requirement for an action in admiralty to enforce a necessaries lien under the Maritime Lien Act, we believe it would have said as much and not left us to infer that the federal courts' jurisdiction rests on an anachronistic common law jurisdictional requirement.

The Supreme Court's decision in *The Resolute,* 168 U.S. 437 (1897), does not compel a different result. In *The Resolute,* the Court considered an action for unpaid seamen's wages. *Id.* at 439. At that time, no statute provided the seamen with a right of action in admiralty, so the seamen invoked the admiralty jurisdiction of the federal district court based on the breach of a maritime contract. *Id.* The defendant countered that the seamen could not assert a valid lien, and thus, the district court lacked admiralty jurisdiction to adjudicate the matter.*Id.* at 440.

The Supreme Court rejected the defendant's

argument. The Court held that jurisdiction was proper if the contract sued upon was a maritime contract and if the property proceeded against was in the custody of the court. *Id.* at 439, 18 S.Ct. 112. The "question of lien or no lien [wa]s not one of jurisdiction, but of merits." *Id.* at 440

While applicable to common law admiralty actions based on the breach of a maritime contract, we believe *The Resolute* is inapplicable to the case before us. In *The Resolute,* the seamen claimed a lien for unpaid wages, not a statutory necessaries lien like the one claimed by Ventura Packers. Indeed, a statutory necessaries lien was unavailable to *The Resolute's* seamen because the Maritime Lien Act was not enacted until 1910--thirteen years after*The Resolute.* The seamen, therefore, had to demonstrateadmiralty jurisdiction by meeting the common law requirements based on the breach of a maritime contract: the arrest of the vessel and a maritime contract. Whether the seamen held a valid lien remained a question of the merits reserved for the trier of fact.

If Ventura Packers had asserted admiralty jurisdiction based on breach of contract, *The Resolute* would apply. In that case, Ventura Packers would have had to prove the arrest of the Ships and existence of a maritime contract. The district courtinterpreted

Ventura Packers' suit in this fashion. Ventura Packers, however, did not rest its assertion of admiralty jurisdiction entirely on the common law. Unlike the seamen in *The Resolute,* Ventura Packers brought suit in admiralty as provided by Congress in the Maritime Lien Act.

In *Logistics Management, Inc. v. One (1) Pyramid Tent Arena,* we considered our exercise of jurisdiction over an action in rem to enforce a cargo lien arising from the breach of an affreightment contract. 86 F.3d 908, 911- 12(9th Cir.1996). A cargo lien arises under general maritime law when the owner of freight fails to pay for its carriage. Under such circumstances, the vessel owner may hold the cargo until payment arrives, or sell the cargo to recover the cost of carriage.

In *Logistics Management,* the plaintiff asserted admiralty jurisdiction based on breach of a maritime (affreightment) contract. *Id.* at 912 & n. 4. The defendant argued that "the determination of a valid lien is a prerequisite for [admiralty] jurisdiction." *Id.* at 911-12. Faced with a situation analogous to the one in *The Resolute,* we reaffirmed the vitality of *The Resolute's* antediluvian rule: " 'The question of lien or no lien is not one of jurisdiction, but of merits.' " *Id.* at 912(quoting *The Resolute,* 168 U.S. at 440).

Ventura Packers implores us to "revisit our holding in *Logistics Management.*" However, such drastic action is unnecessary. The plaintiff in *Logistics Management* asserted admiralty jurisdiction to enforce its cargo lien based on breach of a maritime affreightment contract. Unlike Ventura Packers, the *Logistics Management* plaintiff did not assert admiralty jurisdiction to enforce a necessaries lien based on the Maritime Lien Act or any other statute. Indeed, the Maritime Lien Act was not available to the *Logistics Management* plaintiff because it encompasses only necessaries liens, not cargo liens. Therefore, *Logistics Management,* like *The Resolute,* bears not at all on whether the Maritime Lien Act statutorily confers admiralty jurisdiction to enforce a necessaries lien.

[10] Unencumbered by the inapposite holdings of *The Resolute* and *Logistics Management,* we hold that the Maritime Lien Act establishes specific elements, which if met, permit Ventura Packers to invoke the admiralty jurisdiction of the district court. If Ventura Packers (1) provided necessaries (2) to the Ships (3) on the order of the Owners or a person authorized by the Owners, then it may bring an action in admiralty to enforce the resulting necessaries lien. Ventura Packers need not demonstrate any other jurisdictional element, and it certainly need not rely on the Ships'

breach of a maritime contract to invoke admiralty jurisdiction.

We note that some might construe our holding as a deviation from the Eleventh Circuit's decision in *E.S. Binnings, Inc. v. M/V Saudi Riyadh,* 815 F.2d 660 (11th Cir.1987), *overruled on other grounds by Exxon Corp. v. Cent. Gulf Lines, Inc.,* 500 U.S. 603 (1991). In *E.S. Binnings,* the court concluded that a contract for a shipping agent's services was nonmaritime in nature, and thus no admiralty jurisdiction existed. *Id.* at 666. In so holding, the Eleventh Circuit rejected the argument that the Maritime Lien Act provided an independent basis for jurisdiction over *nonmaritime* concerns, like the disputed agency contract in question. *See id.* at 666 n. 6 ("]he FMLA did not extend admiralty jurisdiction into traditionally nonmaritime areas ...."); *id.* at 667 (" '[T]o be a lien on any theory a claim must be in the first instance maritime.' ") (quoting G. Gilmore & C. Black, *The Law of Admiralty* § 9-35, at 659 (1975)). As we read *E.S. Binnings,* the court expressed no opinion whether the Maritime Lien Act provides jurisdiction over a suit concerning a traditionally maritime concern. *Id.* at 666 ("[T]o give rise to a maritime lien, the occurrence out of which the ... dispute arose must itself be maritime and that means that the occurrence must be within the admiralty jurisdiction of the United States as

established by the Constitution and adopted by the Congress.") (internal quotations omitted).

Our decision, by contrast, holds that the Maritime Lien Act may provide an alternate route to jurisdiction over an action involving the provision of necessaries, an act which is, by definition, maritime. In fact, the Maritime Lien Act's jurisdictional elements ensure the requisite close connection between the goods or services provided and traditional maritime concerns. A farmer in Nebraska, for example, could not invoke admiralty jurisdiction to resolve a disputed tractor sale, even if he asserted a lien against his adversary's boat in San Diego. The farmer's assertion of the lien is of no consequence to the question of admiralty jurisdiction. As in *E.S. Binnings,* admiralty jurisdiction would not lie because the farmer could not demonstrate any tie to a traditional maritime concern. Certainly, he could not meet the Maritime Lien Act's requirements because he did not provide necessaries to a vessel on the order of the owner or a person authorized by the owner.

Instead of disrupting established maritime expectations, as our detractors lament, we think our holding will facilitate modern maritime commerce. Ships will be accountable for the necessaries provided to them, whether or not they received those necessaries as part of a wholly, partially, or nonmaritime contract.

In turn, suppliers can provide an array of maritime and nonmaritime goods and services to ships, secure in their ability to recoup at least the value of those necessaries provided. Having crafted the rule, we are left only to consider whether Ventura Packers met the statutory elements for admiralty jurisdiction provided by the Maritime Lien Act.

II. Exercise of Admiralty Jurisdiction

In this case, the district court did not consider whether the Maritime Lien Act provided an independent basis for the exercise of its admiralty jurisdiction. As the parties have fully briefed the issue, we will examine it. In so doing, we are cognizant that the Maritime Lien Act enumerates the elements required for *both* a valid necessaries lien and the right to enforce that lien in admiralty.

Usually, a district court is free to hear evidence regarding jurisdiction and to resolve factual disputes in determining whether it has jurisdiction over a claim. *Careau Group v. United Farm Workers of Am.*, 940 F.2d 1291, 1293(9th Cir.1991). "However, where jurisdiction is so intertwined with the merits that its resolution depends on the resolution of the merits, the trial court should employ the standard applicable to a motion for summary judgment." Steen, 106 F.3d at

910 (internal quotation marks and citations omitted). In this case, the Maritime Lien Act inextricably intertwines the questions of subject matter jurisdiction and Ventura Packers' substantive claim for relief; accordingly, we consider both questions according to the standards applicable on summary judgment. *See id.; see also Timberlane Lumber Co. v. Bank of Am.*, 549 F.2d 597, 602 (9th Cir.1976).

The Maritime Lien Act provides that a person (1) providing necessaries (2) to a vessel (3) on the order of the owner or a person authorized by the owner has a necessaries lien on the vessel and may bring a civil action in rem to enforce that lien. We now consider the jurisdictional component of each element set forth in the Maritime Lien Act under the summary judgment standard.

A. Providing Necessaries

Necessaries are defined as "repairs, supplies, towage, and the use of a dry dock or marine railway." 46 U.S.C. § 31301(4). The list is not exhaustive, and in fact, modern admiralty jurisprudence interprets "necessaries" broadly, as anything that facilitates or enables a vessel to perform its mission or occupation. *Equilease Corp. v. M/V Sampson,* 793 F.2d 598, 603 (5th Cir.1986); *Farwest Steel,* 769 F.2d at 623. The

term "necessaries" includes most goods or services that are useful to the vessel and keep her out of danger. *See Equilease,* 793 F.2d at 603. "Necessaries" indubitably include the things a prudent owner would provide to enable a ship to perform her particular function. *Id.*

The Ships were engaged in squid fishing, and the services provided by Ventura Packers facilitated their performance of that particular task. Priority dock access and efficient unloading services returned the Ships to sea quickly, thereby maximizing the number of squid caught and the profit gained. *See Porello,* 330 U.S. at 456, 67 S.Ct. 847(holding unpaid stevedores asserted a maritime necessaries lien); *see also* William Tetley, *Stevedores & Maritime Liens,* 8 Mar. Law. 269, 270 (1983). Such services also ensured the freshness and marketability of the catch. Some evidence also indicates that Ventura Packers provided goods to the Ships.

The district court did not reach the issue whether the goods and services provided by Ventura Packers to the Ships were necessaries. We decline to decide this issue in the first instance, and hence, leave for the district court to determine whether the goods and services furnished by Ventura Packer are properly deemed necessaries, and if so, the extent and value of those necessaries.

B. To a Vessel

Ventura Packers unloaded the Ships when they arrived in port 188 times during the 1996-97 Ventura/Santa Barbara squid fishing season. The Owners claim that Ventura Packers' services were provided pursuant to a contract with IFC, and therefore, the services were provided to IFC and not to the Ships themselves. In essence, the Owners claim that Ventura Packers provided services to the Ships as IFC's subcontractor, and thus, that Ventura Packers is not a proper lien claimant. *See The Juniata,* 277 F. 438, 440 (D.Md.1922) (rejecting subcontractor as a lien claimant). In the alternative, the Owners claim that Ventura Packers' services were furnished to IFC's fleet of ships and not to the Ships individually. *See Piedmont,* 254 U.S. at 8; *Foss Launch & Tug Co. v. Char Ching Shipping U.S.A.,* 808 F.2d 697, 701-03 (9th Cir.1987).

Ventura Packers contends that it provided goods and services directly to each Ship and invoiced each Ship individually. Ventura Packers insists that, unlike the coal supply company in *Piedmont,* which provided bulk coal to a ship owner who then apportioned the coal among his fleet, it provided no bulk services to IFC. We conclude that a genuine issue of material fact remains regarding whether Ventura Packers' goods

and services were provided to the Ships.

C. On the Order of the Owner

Whether the services provided by Ventura Packers were provided on the order of the owner or a person authorized by the owner also remains a matter vigorously disputed. That Ventura Packers contracted with IFC is beyond question. The Ships claim, however, that IFC had no authority to act as their agent, and thus, the necessaries provided to the Ships were not on the order of the Owners.

The IFC Articles of Incorporation designate IFC as a "common marketing agency" for its members, and deposition testimony suggests that IFC members understood that IFC would act as their agent in procuring goods and services essential to the 1996-97 squid fishing season. Even if IFC was not authorized to act as the Owners' agent, the Owners themselves authorized many of Ventura Packers' services. On numerous occasions, the Owners verbally requested service from Ventura Packers en route to port, and many of the California fish tickets bear the signature of the Ships' owners and masters. The Owners argue, on the other hand, that IFC acted as a non-profit organization that purchased fish from its members, resold the fish to third persons with an eye towards

negotiating the best price possible, and distributed the profits, if any, back to its members. The district court found the IFC Articles of Incorporation supported this view as well.

We, therefore, leave for the trier of fact to decide whether Ventura Packers provided the Ships with goods and services on the order of the owner or a person authorized by the owner. This inquiry will determine whether there is admiralty jurisdiction and whether Ventura Packers prevails on the merits.

CONCLUSION

[11] The Maritime Lien Act, 46 U.S.C. § 31342, like DOHSA, provides a statutory basis for the exercise of a district court's admiralty jurisdiction. In this case, Ventura Packers adduced sufficient evidence to survive summary judgment, and therefore, we reverse and remand the case for additional proceedings.

REVERSED and REMANDED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FILED
Nov 01 2002
Cathy A Catterson, Clerk, U.S. Court of Appeals

VENTURA PACKERS, INC., a California corporation,

Plaintiff-Appellant,

v

F/V JEANINE KATHLEEN, Official No. 972086, her tackle, furniture & apparel in rem; F/V ROSE LEE, Official No. 942678, her tackle, furniture & apparel in rem; F/V TALIA, Official No. 973296, her tackle, furniture & apparel in rem,

Defendants,

and

ROGER L. INGMAN; JODY K. INGMAN; ROSE LEE LLC; H. EAMES; ANDREA J. EAMES,

Claimants-Appellees.

No. 00-56448
D.C. No. CV-98-09916-ABC

ORDER

Before: TROTT, THOMAS, and WARDLAW, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to deny the petition for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc, are
DENIED.

(2)

FILED
MAR 28 2003

No. 02-1255

In the

Supreme Court of the United States

F/V JEANINE KATHLEEN, Official No. 972086, Her Tackle, Furniture and Apparel, *in rem*; F/V ROSE LEE, Official No. 942678, Her Tackle, Furniture and Apparel, *in rem*, F/V TALIA, Official No. 973296, Her Tackle, Furniture and Apparel, *in rem*, Defendants,
and
ROGER INGMAN; JODY INGMAN; ROSE LEE LLC; DENNIS H. EAMES; ANDREA EAMES,

Petitioners,

v.

VENTURA PACKERS, INC., a California Corporation,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Denise A. Brogna
Counsel of Record
LASCHER & LASCHER,
A Professional Corporation
605 Poli Street
Ventura, CA 93002
(805) 648-3228
Attorneys for Respondent

CURRY & TAYLOR • (202) 393-4141 • HTTP://USSCINFO.COM

2+1pp

RESTATEMENT OF QUESTION PRESENTED

Where there are triable issues of material fact concerning the existence of federal subject matter jurisdiction based on the provision of necessaries under the Maritime Lien Act, 46 U.S.C. §31342, is summary dismissal by the District Court proper under Federal Rules of Civil Procedure, Rule 56?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of the Supreme Court of the United States, respondent makes the following corporate disclosure statement:

Respondent Ventura Packers, Inc., is a privately held California corporation. Ventura Packers has no parent companies nor wholly owned subsidiaries.

TABLE OF CONTENTS

RESTATEMENT OF THE QUESTION PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

COUNTER-STATEMENT OF THE CASE 1

Factual Background 1

Procedural History 3

I. THE WRIT SHOULD BE DENIED BECAUSE THE STANDARDS FOR GRANTING CERTIORARI HAVE NOT BEEN MET 4

A. There Are No Compelling Reasons for Review Because (1) the Ninth Circuit Has Not Made New Law, (2) and the Matter Is Not Procedurally Ripe 4

1. The Ninth Circuit Did Not Create New Law 5

2. Because There Remain Facts in Dispute Which Have Not Been Tried, This Matter Is Not Ripe For Review 8

B. The Ninth Circuit Decision Does Not Conflict With Decisions by this Court or Any Other Court 10

1. United States Supreme Court Decisions 10

2. United States Court of Appeals Decisions..... 11

3. Ninth Circuit Decisions..... 14

CONCLUSION..... 15

TABLE OF AUTHORITIES

CASES

ALBANY INSURANCE COMPANY v. M.V. ISTRIAN EXPRESS, 61 F.3D 709 (9TH CIR. 1989) 14

ALYESKA PIPELINE SERVICE CO. v. VESSEL BAY RIDGE, 703 F.2D 381 (9TH CIR. 1983), CERT. DISMISSED, 467 U.S. 1247, 104 S.CT. 3526, 82 L.ED. 2D 852 (1984).....5

AMERICAN STEVEDORES, INC. v. PORELLO, 330 U.S. 446 (1947).....7

ATLANTIC MUTUAL INSURANCE COMPANY v. BALFOUR MACLANE INTN'L LTD., ET AL., 968 F.2D 196 (2ND CIR. 1992) 5

BERMUDA EXP., N.V. v. M/V LISA (EX LAURIE U), 872 F.2D 554 (3D CIR. 1989) 11, 12, 13

BOAT LA SAMBRA v. LEWIS, 321 F.2D 29 (9TH CIR 1963).....12, 14

CHASE MANHATTAN FINANCIAL SERVICES, INC. v. MCMILLIAN, 896 F.2D 452 (10TH CIR. 1990).....11

COLONIAL PRESS OF MIAMI, INC. v. THE ALLEN'S CAY, 277 F.2D 540, 1959 A.M.C. 527 (5TH CIR. 1960).....8

CORY BROS. & CO. v. UNITED STATES, 51 F.2D 1010 (2D CIR. 1931).....7

DOMENICO v. ALASKA PACKERS' ASS'N, 112 F. 554 (N.D. CAL. 1901).....7

E.S. BINNINGS, INC. v. M/V SAUDI RIYADH, 815 F.2D 660 (11TH CIR. 1987)....11, 12

EQUILEASE CORP. v. M/V SAMPSON, 793 F.2D 598 (5TH CIR. 1986)....7

EXXON CORPORATION v. CENTRAL GULF LINES, INC., 500 U.S. 603, 111 S.CT. 2071 (1991)....10, 11, 12

EXXON CORPORATION v. CENTRAL GULF LINES, INC., 707 F. SUPP 155 (S.D.N.Y. 1989)....11

FARWEST STEEL CORP. v. BARGE SEA SPAN 241, 769 F.2D 620 (9TH CIR. 1985)....5, 7, 14

FOSS LAUNCH AND TUG COMPANY v. CHAR CHING SHIPPING USA LIMITED, 808 F.2D 697, 699 (9TH CIR. 1987)....7

GENERAL ELEC. CREDIT v. DRILL SHIP, 668 F.2D 811 (5TH CIR. 1982)....8

HINKENS STEAMSHIP AGENCY, INC. v. FREIGHTERS, INC., 498 F.2D 411 (9TH CIR. 1974)....7

INBESA AMERICA, INC. v. M/V ANGLIA, 134 F.3D 1035 (11TH CIR. 1998)....7, 11, 13

MARINE FUEL SUPPLY & TOWING, INC. v. THE M/V KEN LUCKY, 869 F.2D 473 (9TH CIR, 1988)....14

MARUBENI-IIDA (AMERICA) v. NIPPON YUSEN KAISHA, 207 F.SUPP 418 (S.D. N.Y. 1962)....5

MINTURN v. MAYNARD, 58 U.S. 477, 15 L.ED 235 (1855)....12

MORTENSEN v. FIRST FED'L SAV. & LOAN ASS'N., 549 F.2D 844 (3D CIR. 1977)....9

MURRAY V. SCHWARTZ, 175 F.2D 72 (2D CIR. 1949) 11

NILO BARGE LINE, INC. V. M/V BAYOU DULARGE, 584 F.2D 841, 1980 A.M.C. 750 (8TH CIR.1978) 11

OWENS-ILLINOIS, INC. V. UNITED STATES DISTRICT COURT, 698 F.2D 967 (9TH CIR. 1983).....5

PAYNE V. S.S. TROPIC BREEZE, 423 F.2D 236 (1ST CIR. 1970) 7

PORT OF PORTLAND V. THE M/V PARALLA, 892 F.2D 825 (9TH CIR. 1989).....14

RESOLUTE, 168 U.S. 437 (1897) 6

ROCK ISLAND BRIDGE, 73 U.S. (6 WALL) 213 (1867) 6

RUPERT CITY, 213 F. 263 (W.D. WASH 1914).....8

SILVER START ENTERPRISES V. SARAMACCA, 82 F.3D 666 (5TH CIR. 1996).....6

SIMON V. INTERCONTINENTAL TRANSPORT, 882 F.2D 1435 (9TH CIR. 1989).....4, 5

SOUTH CAROLINA STATE PORTS AUTHORITY V. M/V TYSON LYKES, 837 F.SUPP 1357 AFFIRMED 67 F.3D 59 (D.S.C. 1993).....7

STEEN V. JOHN HANCOCK MUT. LIFE INS. CO., 106 F.3D 904 (9TH CIR. 1997) 9

SUN VALLEY GASOLINE, INC. V. ERNST ENTERPRISES, INC., 711 F.2D 138 (9TH CIR. 1983).....9

SUSQUEHANNA, 3 F.2D 1014, 1923 A.M.C. 643 (D. MASS 1923).....8

TRINIDAD FOUNDRY AND FABRICATING, LTD. v. M/V K.A.S. CAMILLA, 966 F.2D 613 (11TH CIR. 1992) 7

UNIVERSAL SHIPPING, INC. v. THE PANAMANIAN FLAG BARGE, 563 F.2D 483 (9TH CIR. 1976) 7

VENTURA PACKERS, INC. v. F/V JEANINE KATHLEEN, 305 F.3D 913 (9TH CIR. CAL. 2002) ..... *passim*

WALTER ADAMS, 253 F. 20 (1ST CIR. 1918) 11, 12, 13

CONSTITUTIONS, STATUTES, RULES, REGULATIONS

15 U.S.C. §521 1

28 U.S.C. §1333 14

46 U.S.C. §31341 7

46 U.S.C. §31342 ..... *passim*

F.R.C.P. RULE 9 3

F.R.C.P. RULE 56 ..... i, 9

SUPPLEMENTAL RULES C AND E 3

UNITED STATES SUPREME COURT RULE 10 4

UNITED STATES SUPREME COURT RULE 29.6 ii

OTHER AUTHORITIES

2 *BENEDICT ON ADMIRALTY* (7TH ED. 1996) §35 AT 3-22 7

GILMORE AND BLACK, *THE LAW OF ADMIRALTY*, (2ND ED. 1975), § 9-19 AT 672 6

COUNTER-STATEMENT OF CASE

Factual Background

Ventura Packers is a California corporation doing business in Ventura Harbor, California [ER 1-2; DN 1].[1] Independent Fisherman's Cooperative (IFC) was formed under the Fisherman's Collective Marketing Act, 15 United States Code §521 [ER 193-194; DN 21 and 51, Ex. G]. Petitioners F/V Jeanine Kathleen, Official No. 972086, F/V Rose Lee, Official No. 942678, and F/V Talia, Official No. 973296 and vessel owners/petitioners Dennis H. Eames, Roger L. and Jody K. Ingman, Richard Eide and Rose Lee, LLC were members of IFC during the 1996-1997 squid fishing season [ER 36, 44, 51, 90, 95, 100, 194-195, 326, 343, 494-497, 1588; DN 6-8, 15-17, 21, 26, 28, 51, 87].

Squid decomposes rapidly. If it is not brought into port, processed, and frozen within 24 hours, its fitness for human consumption diminishes [ER 194-196, 480-481, 532, 539, 779-780; DN 21 and 51, Ex. E, J and L]. Priority dock access and speed in unloading and processing is extremely important [ER 504, 522, 778-779; DN 51 and 55]. For these reasons, petitioners authorized Greg Kirsch to act as their local agent in contracting for unloading, processing, and marketing of squid from IFC vessels by Ventura Packers so petitioners could spend more time catching fish and making money [ER 194-195, 494-497, 502, 517-518, 524, 540-541; DN 21 and 51, Ex. G, H, J and L].

---

[1] "ER" stands for Excerpts of Record, "DN" for Docket Number, and "Ex." for Exhibit.

Roger Ingman, master of the Jeanine Kathleen, Mitch and Richard Eide, masters of the Rose Lee, and Joseph Donahue, master of the Talia, authorized unloading and processing of their squid by calling ahead to Ventura Packers on their way into port [ER 198, 494, 502, 540-541, 782; DN 21, 55 and 51, Ex. G, H, and L]. Ventura Packers granted priority dock access, unloaded, packed, iced and shipped squid from petitioners' vessels to the processing facility [ER 1-8, 196-198, 777-780; DN 1, 21 and 55].

Petitioners were to pay Ventura Packers $80.00 per ton of squid unloaded from each vessel for these services [ER 4, 659, 777-780; DN 1, 53, and 55] – $50 per ton for ice and stevedoring, $10 per ton for priority dock access, and $20 per ton for government entity fees, transportation, and cold storage (*Ventura Packers, Inc. v. F/V Jeanine Kathleen*, 305 F.3d 913, 916 (9th Cir. Cal. 2002)). Each time a vessel was unloaded, a separate "fish ticket" was filled out by Ventura Packers, many of which bear the actual signature of the vessel owners or masters like Ingman, Eide, and Donahue [ER 198, 441, 658, 789-903; DN 21, 53, and 56, Ex. A-C].

Ventura Packers provided services to petitioners on 188 different occasions [ER 198; DN 21]. As a result, petitioners owed Ventura Packers $93,174.84 for unloading the Jeanine Kathleen, $121,617.92 for unloading the Rose Lee, and $82,891.08 for unloading the Talia. Of those amounts, $22,514.33 is still owed by the Jeanine Kathleen; $105,118.81 is still owed by the Rose Lee; and $42,705.06 is still owed by the Talia [ER 660, 664-666, 763; DN 53, Exhibit A; DN 54].

Procedural History

Ventura Packers complained in rem for payment for necessaries furnished to petitioners pursuant to 46 U.S.C. §31342 and Federal Rules of Civil Procedure, Rules 9(h) and Supplemental Rules C(a), C(2), E(2)(a), and seized the vessels [ER 1-9, 10-29; DN 1, 2, 3, and 4]. Petitioners Roger and Jody Ingman, Richard Eide, and Dennis Eames, submitted undertakings to have their vessels released and intervened [ER 36-55, 56-59; DN 6, 7, 8, 12].

Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, which the District Court initially denied [ER 60-160, 289-415, 416-423; DN 13-18, 24-30, 35]. Ventura Packers moved for summary judgment on the grounds that the defendant vessels could not avoid liability for necessaries furnished to each vessel [ER 435-991, 1502-1552; DN 49-58, 79-80, 83]. Petitioners filed a counter motion for summary judgment asserting lack of subject matter jurisdiction and advocating dismissal [ER 992-1100, 1370-1501; DN 61-64, 69]. The District Court granted petitioners' motion, and entered a judgment of dismissal in favor of petitioners [ER 1553-1573; DN 87-89].

Ventura Packers appealed [ER 1581-1625; DN 91-94]. The Ninth Circuit reversed and remanded the case to the District Court because there were triable issues of material fact concerning the provision of necessaries to vessels upon the order of the owner or authorized representative as described under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d 913, 924).

I.

THE WRIT SHOULD BE DENIED BECAUSE THE STANDARDS FOR GRANTING CERTIORARI HAVE NOT BEEN MET.

This case does not meet the standards set out in Rule 10 of the United States Supreme Court Rules. There are no compelling reasons for review, nor are there any important federal questions involving conflicts with decisions of this Court, the United States Courts of Appeals, or the decisions of another state court of last resort.

A. There Are No Compelling Reasons for Review Because (1) the Ninth Circuit Has Not Made New Law, (2) and the Matter Is Not Procedurally Ripe.

There are two basis for admiralty jurisdiction here. The first is a maritime contract (*Simon v. Intercontinental Transport*, 882 F.2d 1435, 1440, 144-1442 (9th Cir. 1989)). The second is a maritime lien for "necessaries" under the Maritime Lien Act, 46 U.S.C. §31342.

Petitioners argue throughout their brief that the Ninth Circuit has made new law because it did not require the existence of a maritime contract as a prerequisite to remanding the matter for trial on the supply of necessaries to enforce a maritime lien. To support this argument, petitioners state that both the District Court and the Ninth Circuit found that there was no contract [Petition, pp. 1, 6]. This statement is untrue.

Contrary to petitioners' assertions, both the District Court and the Ninth Circuit found that there was

a contract in this case. However, the courts declined to exercise subject matter jurisdiction under that contract because it intertwined both maritime and non-maritime elements [See ER 1566-1567; DN 87]. "[T]he reality of the situation is that the contract upon which Ventura Packer's maritime lien claim is based involves both maritime and non-maritime elements" (*Ventura Packers, Inc., supra*, 305 F.3d at 916, 917).

Where the contract contains both maritime and non-maritime elements, the majority of which are maritime in nature, the court has discretion to exercise jurisdiction over the maritime portions of the contract (*Atlantic Mutual Insurance Company v. Balfour MacLane Intn'l Ltd., et al.*, 968 F.2d 196, 199 (2nd Cir. 1992); *Simon, supra*, 882 F.2d 1435 at 1442; *Marubeni-Iida (America) v. Nippon Yusen Kaisha*, 207 F.Supp 418, 420 (S.D. N.Y. 1962). The District Court declined jurisdiction based on maritime contract. It did not analyze jurisdiction based upon the provision of necessaries under the Maritime Lien Act.

1. The Ninth Circuit Did Not Create New Law.

Petitioners argue that the Ninth Circuit created a new basis for admiralty jurisdiction when there is no maritime contract. However, admiralty jurisdiction may be based upon either (1) a maritime lien, ***or*** (2) a maritime contract (*Farwest Steel Corp. v. Barge Sea Span 241*, 769 F.2d 620, 621 (9th Cir. 1985), citing *Alyeska Pipeline Service Co. v. Vessel Bay Ridge*, 703 F.2d 381, 384 (9th Cir. 1983), cert. dismissed, 467 U.S. 1247, 104 S.Ct. 3526, 82 L.Ed. 2d 852 (1984) and *Owens-Illinois, Inc. v. United States District Court*, 698 F.2d 967, 970 (9th Cir. 1983)).

The Ninth Circuit noted that while the contract in question could be a basis for admiralty jurisdiction, "Congress provided an independent statutory basis for admiralty jurisdiction by enacting 46 U.S.C. §31342" (*Ventura Packers, Inc., supra*, 305 F.3d at 917). Thus, the decision of the Ninth Circuit here merely clarifies the point it made in *Farwest Steel*, that there are alternative basis for federal subject matter jurisdiction, and a necessaries lien brought under the Maritime Lien Act is one such basis (*Ventura Packers, Inc., supra*, 305 F.3d at 917, 922-924).

46 U.S.C. §31342, which is part of the Maritime Lien Act, provides for a civil action to enforce a maritime lien against a vessel, by a creditor who has provided "necessaries" to that vessel at the direction of the owner or master (46 U.S.C. §31342). A maritime lien is a special property right in a vessel which secures creditors who provide supplies to keep a ship going (*Silver Start Enterprises v. Saramacca*, 82 F.3d 666, 668 (5th Cir. 1996)). The concept developed as a necessary incident of the operation of vessels. Indeed, the existence of a maritime lien is synonymous with admiralty jurisdiction (Gilmore and Black, *The Law of Admiralty*, (2nd Ed. 1975), § 9-19 at 672; *The Rock Island Bridge*, 73 U.S. (6 Wall) 213, 215 (1867); *The Resolute*, 168 U.S. 437, 440 (1897)).

The lien statute, 46 U.S.C. §31342, provides in pertinent part:

> "(a) Except as provided in subsection (b) of this section, a person providing necessaries to a vessel on the order of the owner or a person authorized by the owner –
> (1) has a maritime lien on the vessel;

> (2) may bring a civil action in rem to enforce the lien; and
> (3) is not required to allege or prove in the action that credit was given to the vessel."

For a lien under 46 U.S.C. §31342, all that is required is that a creditor provide "necessaries" to a vessel at the direction of the owner or master of the vessel (2 *Benedict on Admiralty* (7th Ed. 1996) §35 at 3-22; 46 U.S.C. §§31341-31342). The term "necessaries" is liberally construed to include anything that facilitates or enables a vessel to perform its mission or occupation, anything reasonably needed for the venture in which the ship is engaged (*Foss Launch and Tug Company v. Char Ching Shipping USA Limited*, 808 F.2d 697, 699 (9th Cir. 1987); *Equilease Corp. v. M/V SAMPSON*, 793 F.2d 598, 603 (5th Cir. 1986); *Farwest Steel, supra*, 769 F.2d at 623; *Payne v. S.S. Tropic Breeze*, 423 F.2d 236, 240 (1st Cir. 1970)).

"Necessaries" may include: money, labor, material, skill, or personal services; dockage and stevedoring; the unloading, weighing, icing, processing, packaging, and immediate transport of fish (*Trinidad Foundry and Fabricating, Ltd. v. M/V K.A.S. Camilla*, 966 F.2d 613, 615-616 (11th Cir. 1992); *Inbesa America, Inc. v. M/V Anglia*, 134 F.3d 1035, 1037 (11th Cir. 1998); *Universal Shipping, Inc. v. The Panamanian Flag Barge*, 563 F.2d 483, 484 (9th Cir. 1976); *South Carolina State Ports Authority v. M/V Tyson Lykes*, 837 F.Supp 1357, 1366-1367, affirmed 67 F.3d 59 (D.S.C. 1993); *American Stevedores, Inc. v. Porello*, 330 U.S. 446, 456 (1947); *Cory Bros. & Co. v. United States*, 51 F.2d 1010, 1011 (2d Cir. 1931); *Domenico v. Alaska Packers' Ass'n*, 112 F. 554, 556 (N.D. Cal. 1901); *Hinkens Steamship Agency, Inc. v. Freighters, Inc.*, 498 F.2d 411 (9th Cir. 1974)). Necessaries may also include the cost of

transporting supplies; the weighing, inspecting, fumigation and shipping of cargo; and printing materials (*The Rupert City*, 213 F. 263 (W.D. Wash 1914); *The Susquehanna*, 3 F.2d 1014, 1923 A.M.C. 643 (D. Mass 1923); *Colonial Press of Miami, Inc. v. The Allen's Cay*, 277 F.2d 540, 1959 A.M.C. 527 (5th Cir. 1960)). Necessaries may even include food catering services (*General Elec. Credit v. Drill Ship*, 668 F.2d 811 (5th Cir. 1982)).

On summary judgment, there were factual disputes which concerned: (1) whether all of the services provided by Ventura Packers qualified as "necessaries;" and (2) if so, whether all services were ordered or accepted by the vessel's authorized agent, owner or master. Because these factual questions had not yet been resolved, the Ninth Circuit remanded this matter to the District Court for further trial on the factual disputes (*Ventura Packers, Inc., supra*, 305 F.3d at 924).

2. Because There Remain Facts in Dispute Which Have Not Been Tried, This Matter Is Not Ripe For Review.

The procedural status of this case does not warrant review. Here, Ventura Packers asserted federal subject matter jurisdiction on two grounds: (1) the existence of a lien *in rem* based upon breach of a maritime contract; and alternatively, (2) the existence of a lien *in rem* based upon the provision of "necessaries" under the Maritime Lien Act, 46 U.S.C. §31342.

Petitioners moved to dismiss the complaint for lack of subject matter jurisdiction, arguing that the contract in question was not maritime in nature. The District Court summarily dismissed Ventura Packers' *in*

rem complaint for lack of subject matter jurisdiction because the contract in question involved both maritime and non-maritime activities, which were not severable. Therefore, the District Court declined to assert admiralty jurisdiction based on maritime contract.

The Ninth Circuit agreed with the District Court's finding that the contract in question covered both maritime and non-maritime activities. However, the Ninth Circuit held that the District Court's subject matter jurisdiction analysis was flawed because it failed to look at subject matter jurisdiction under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d at 917, 922).

The Ninth Circuit found there were triable issues of material fact concerning subject matter jurisdiction and the provision of necessaries to vessels upon the order of the owner or authorized representative as described under the Maritime Lien Act, 46 U.S.C. §31342 (*Ventura Packers, Inc., supra*, 305 F.3d 922-924). Where jurisdictional facts, essential to the elements underlying the federal claim, are intertwined and the same statute provides the basis for both relief and jurisdiction, the court should not resolve disputed facts, because jurisdictional fact finding deprives the litigants of the protections otherwise afforded by Federal Rules of Civil Procedure, Rule 56 (*Steen v. John Hancock Mut. Life Ins. Co.*, 106 F.3d 904, 910 (9th Cir. 1997); *Sun Valley Gasoline, Inc. v. Ernst Enterprises, Inc.*, 711 F.2d 138, 139, 150 (9th Cir. 1983); *Mortensen v. First Fed'l Sav. & Loan Ass'n.*, 549 F.2d 844, 890 (3d Cir. 1977)). Because the Maritime Lien Act "inextricably intertwines the questions of subject matter jurisdiction and Ventura Packers' substantive claim for relief," the Ninth Circuit remanded this matter to the District Court for trial on disputed factual questions which involved both

jurisdiction and the merits of the lien (*Ventura Packers, Inc., supra*, 305 F.3d 922-924).

There has yet to be a final judgment after a trial of these disputed factual questions. Therefore, this case simply is not ripe for review.

B. The Ninth Circuit Decision Does Not Conflict With Decisions by this Court or Any Other Court.

Petitioners' conflicting decisions argument is founded upon petitioners' misunderstanding of the alternative grounds for subject matter jurisdiction expressed in Ventura Packers' pleadings, and upon petitioners' misinterpretation of the Ninth Circuit's decision. Nevertheless, contrary to petitioners' assertions [Petition, pp. 6-14], the Ninth Circuit decision does not conflict with decisions by this Court or other courts within the United States.

1. United States Supreme Court Decisions.

Petitioners allege that the decision of the Ninth Circuit conflicts with *Exxon Corporation v. Central Gulf Lines, Inc.*, 500 U.S. 603, 111 S.Ct. 2071 (1991) [Petition, pp. 6-7]. Petitioners argue that *Exxon* requires the existence of a maritime contract in order for there to be federal subject matter jurisdiction under the Maritime Lien Act [Petition, pp. 6-7].

To support their argument, petitioners quote *Exxon, supra*, as holding "that 'a prerequisite to the existence of a maritime lien for breach of contract is that the subject matter of the contract must fall within admiralty jurisdiction'" [Petition, pp. 7-8, citing *Exxon*

Corporation v. Central Gulf Lines, Inc., 707 F. Supp 155, 158 (S.D.N.Y. 1989)]. However, this Court did not require admiralty jurisdiction to exist under maritime contract in order for subject matter jurisdiction to exist under the Maritime Lien Act. This Court did not even address the issue.

> "We express no view on whether Exxon is entitled to a maritime lien under the Federal Maritime Lien Act. That issue is not before us, and we leave it to be decided on remand" (*Exxon, supra,* 500 U.S. 606, 613).

Therefore, the decision of the Ninth Circuit to remand this case to the District Court for trial on disputed facts concerning subject matter jurisdiction and the merits of a valid lien under the Maritime Lien Act, does not conflict with the *Exxon*.

2. United States Court of Appeals Decisions.

Petitioners argue that the Ninth Circuit's decision conflicts with decisions of the First, Second, Third, Eighth, Tenth and Eleventh Circuits, citing *The WALTER ADAMS*, 253 F. 20, 24 (1st Cir. 1918); *Murray v. Schwartz*, 175 F.2d 72, 73 (2d Cir. 1949); *Bermuda Exp., N.V. v. M/V LISA (ex Laurie U)*, 872 F.2d 554, 563 (3d Cir. 1989); *Nilo Barge Line, Inc. v. M/V BAYOU Dularge*, 584 F.2d 841, 842 1980 A.M.C. 750 (8th Cir.1978); *Chase Manhattan Financial Services, Inc. v. McMillian*, 896 F.2d 452 (10th Cir. 1990); *E.S. Binnings, Inc. v. M/V SAUDI RIYADH*, 815 F.2d 660 (11th Cir. 1987); *Inbesa America, Inc. v. M/V ANGLIA*, 134 F.3d 1035, 1036, 1038 (11th Cir. 1998); and *BOAT LA*

SAMBRA v. Lewis, 321 F.2d 29 (9th Cir 1963)[Petition, p. 7-12].

First, all these cases are actions in which a claimant asserted a maritime lien based upon a maritime contract. These authorities do not involve claimants who asserted a maritime lien based upon the provision of necessaries to an owner or master of a vessel, as articulated in the Maritime Lien Act. Therefore, these authorities do not speak to the issue addressed by the Ninth Circuit concerning Ventura Packers's assertion of a lien under the Maritime Lien Act.

Second, *Exxon* overruled *Minturn v. Maynard*, 58 U.S. 477, 15 L.Ed 235 (1855) and the requirement of a non-agency maritime contract that was wholly maritime in nature (*Id.*, at 610-612). To the extent that *The WALTER ADAMS*, *Murray v. Schwartz*, *Bermuda Exp.*, *Nilo Barge Line*, *Chase Manhattan Financial Services, Inc.*, *E.S. Binnings*, and *BOAT LA SAMBRA* predate *Exxon* and rely on *Minturn* and its wholly maritime in nature, non-agency contract reasoning, they are no longer good authority (*Id.*, at 608, fn.4, 612). This is because *Exxon*, *supra*, 500 U.S. 603, 606 fn. 2, 612-613, found admiralty jurisdiction in favor of Exxon under the assertion of a maritime lien based on both agency and non-agency maritime contracts for the provision of fuel, and in instances where it provided fuel in a manner outside of a contract.

Further, the court in *E.S. Binnings*, rejected the argument that the Maritime Lien Act provided jurisdiction over ***non-maritime concerns***. However, like this Court in *Exxon*, the *E.S. Binnings* court expressed no opinion on jurisdiction over a suit covering ***traditional maritime concerns*** (*E.S. Binnings*, *supra*, 815 F.2d at 6[illegible]).

Third, even though many of the authorities cited by petitioners were decided on the basis of maritime contract, these authorities recognize a distinction between a lien based on maritime contract and a lien based upon the provision of maritime necessities (*The WALTER ADAMS*, *supra*, 253 F. at 23; *Bermuda Exp., N.V.*, *supra*, 872 F.2d at 563; *Inbesa*, *supra*, 134 F.3d at 1036-1037 fn.2, 1038). For example, even though *Inbesa* did not make a necessities lien claim, that court reasoned that "federal admiralty jurisdiction is coterminous with the right of providers of maritime services to maritime liens" (*Inbesa*, *supra*, 134 F.3d at 1036-1037 fn.2, 1038). This statement shows that the *Inbesa* court recognized that a claimant can have not only a lien action based on contract, but also a concurrent civil action for a maritime lien based upon the provision of necessaries, as in this case. Thus, the reasoning of the *Inbesa* court is line with the reasoning of the Ninth Circuit:

> "If Ventura Packers had asserted admiralty jurisdiction based on breach of contract, *The Resolute* would apply. In that case, Ventura Packers would have had to prove the arrest of the Ships and existence of a maritime contract. Ventura Packers, however, did not rest its assertion of admiralty jurisdiction entirely on the common law. Ventura Packers brought suit in admiralty as provided by Congress in the Maritime Lien Act"
> (*Ventura Packers*, *supra*, 305 F.3d at 920-921).

3. Ninth Circuit Decisions.

Petitioners argue that the Ninth Circuit decision conflicts with *BOAT LA SAMBRA*, *supra*, 321 F.2d 29 [Petition, p. 14]. Unfortunately, like the preceding authority cited by petitioners, *BOAT LA SAMBRA* was brought as a breach of ship-building contract lien action, not as a necessaries lien. Therefore, it dos not apply to the Ninth Circuit's decision in this case.

The Ninth Circuit has previously assumed jurisdiction over maritime liens cases without requiring a contract (*The Port of Portland v. The M/V Paralla*, 892 F.2d 825, 827-828 (9th Cir. 1989) [jurisdiction assumed under 28 U.S.C. §1333]; *Marine Fuel Supply & Towing, Inc. v. The M/V Ken Lucky*, 869 F.2d 473, 476-477 (9th Cir, 1988) [supply of fuel to vessel without contract]; *Albany Insurance Company v. M.V. Istrian Express*, 61 F.3d 709, 710 (9th Cir. 1989)). Further, the Ninth Circuit has held that "[t]he district court had admiralty jurisdiction if it was adjudicating either a maritime lien (citation omitted), or a contact . . . (citation omitted)" (*Farwest Steel Corp.*, *supra*, 769 F.2d at 621).

Lastly, the Ninth Circuit was very conscious of past decisions concerning maritime liens and the Maritime Lien Act. It carefully explained the evolution of the Act and resolved any perceived conflicts (*Ventura Packers*, *supra*, 305 F.3d at 920-922).

Petitioners have continually misunderstood the different basis for federal subject jurisdiction asserted by Ventura Packers. This misunderstanding has colored petitioners' interpretation of the Ninth Circuit's decision, along with other decisions made by this Court and the various Courts of Appeals. Petitioners'

misinterpretation of non-applicable case law is not grounds for granting their writ.

CONCLUSION

Because triable questions of material fact remain which preclude summary resolution of jurisdiction issues, respondent Ventura Packers requests that the petition for writ of certiorari be denied.

Should this Court be so inclined, Ventura Packers requests an award of costs.

Respectfully submitted,

DENISE ABUNDIS BROGNA
Counsel of Record for
Respondent, Ventura Packers, Inc.

LASCHER & LASCHER
605 Poli Street
Ventura, CA 93001
Telephone: 805-648-3228
Facsimile: 805-643-7692